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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,

Respondent,

v.

JOSEPH VINCENT THOMAS,

Petitioner,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

B. ALAN SEIDLER
Attorney for Petitioner
118 Main Street
Tappan, New York 10983
(914) 359-3770

38 pp

QUESTIONS PRESENTED

Was petitioner's prison sentence cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution, and alternately, an abuse of discretion by the Trial Court?

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SUPREME COURT OF THE

UNITED STATES OF AMERICA

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UNITED STATES OF AMERICA,

Respondent,

v.

JOSEPH VINCENT THOMAS,

Petitioner,

----------x

ON WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

OPINION BELOW

The instant Memorandum Opinion of the United States Court of Appeals for the Third Circuit is annexed hereto as Appendix A; the Judgment and Commitment Order of the United States District Court is annexed hereto as Appendix

C.

JURISDICTION

This matter is On Writ of Certiorari to the United States Court of Appeals for the Third Circuit. The Judgment of that Court was entered February 12, 1985.

The statutory provision conferring upon this Court jurisdiction to review the judgment of the Court of Appeals by Writ of Certiorari is 28 U.S.C.A. § 1254.

CONSTITUTIONAL& STATUTORY PROVISIONS

Title 21 U.S.C.A. § 848 provides:

Penalties; forfeiture

"(a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of

imprisonmnet which may not be less than ten years and which may be up to life imprisonment, to a fine of not more than $100,000., and to the forefeiture proscribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years, and which may be up to life imprisonment, to a fine of not more than $200,000. and to the forfeiture prescribed in paragraph (2).

Continuing criminal enterprise defined

(b) For purpose of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for

which is a felony, and

(2) such violation is part of a continuing series of violation of this subchapter or subchapter II of this chapter-

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management; and

(B) from which such person obtains substantial income or resources.

STATEMENT OF THE CASE

The instant matter is On Writ of Certiorari to the United State Court of Appeals for the Third Circuit which affirmed on February 12, 1985, the judgment of conviction entered

July 16, 1984, in the United States District Court for the District of New Jersey [Hon. John W. Bissell, U.S.D.J.] (Appdx.).

Petitioner was charged in a six (6) count indictment [Cr. 83-361-01] filed with the Clerk of the United States District Court for the District of New Jersey on December 21, 1983, alleging a violation of Title 21 U.S.C.A. §848; Title 21 U.S.C.A. §846; and four (4) counts of Title 21 U.S.C.A. §841 (a) (1), and Title 18 U.S.C.A. §2, respectively. On June 4, 1984, petitioner entered a plea of guilty to Count I aforesaid pursuant to a plea bargain agreement with the Government; said agreement being approved by the District Court prior to its entry.

On July 16, 1984, petitioner was sentenced by Judge Bissell to fifteen

(15) years incarceration to run consecutively with a forty (40) year sentence imposed by the State of Virginia; Counts II through VI herein being dismissed by the Court on the Government's application, and with the consent of the petitioner.

Petitioner was arrested on or about January 13, 1982 and indicted in Pulaski County, Virginia, for Conspiracies to Distribute and Manufacture Methaqualone [Virginia Code Section 18.2 - 256]. On May 19, 1983, after a Virginia State trial by jury, appellant was sentenced by the Hon. R. Williams Arthur of the Circuit Court of Pulaski County, Virginia, to a net of forty (40) years incarceration, and fined $25,000.00. In July of 1984, petitioner exhausted his Virginia appellate remedies; the Virginia Supreme Court denying his

petition for appeal from that conviction.

Petitioner's co-conspirators in the state prosecution were Samuel Boardwine, Ronald Boardwine, Gary Camp, Robert Fitz, and John Ayers. According to evidence adduced at trial, the State employed wiretaps on said Ronald Boardwine from November 23, 1981, until January 12, 1982. Further evidence indicated that co-defendant John Ayers travelled to South Carolina where he met the instant petitioner, and received 50,000 methaqualude tablets. Ayers later distributed the tablets to co-conspirators as well as to others in the Pulaski County area. Another State co-conspirator, Samuel Boardwine, was in the process of transporting eight (8) barrels of micro crystal cellulose when he was arrested by

the Virginia State Police, and those ingredients and nine thousand dollars ($9,000.) were seized.

Paragraphs "1" and "2" of Count I herein are repetetive of the aforesaid Virginia indictment. Further, the Government sought to intoduced the same intercepted telephone conversations, and oral evidence in the District of New Jersey as the State of Virginia employed in its earlier prosecution.

REASONS FOR GRANTING THE WRIT

Petitioner submits that the decision of the United States Court of Appeals for the Third Circuit sanctioned the departure by the United States District Court for the District of New Jersey, from accepted and usual judicial

proceedings with regard to sentencing pursuant to Title 21 U.S.C.A. §848. Petitioner maintains his sentence was cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution, and alternately, an abuse of discretion by the Trial Court.

A sentence so severe as to be cruel and unusual within the meaning of the Eighth Amendment of the United States Constitution cannot stand. Weems v. United States, 217 u.S. 349 (1910); Downey v. Perini, 518 F. 2d 1288, vacated on other grounds, 423 U.S. 933 (1975). Petitioner, a man in his mid thirties, with a wife and child, a record of employment, and no prior criminal history other than the aforesaid Virginia conviction, received a fifteen (15) year Federal

sentence consecutive to a forty (40) year Virginia sentence for essentially the same criminal acts within the same time frame. The consecutive sentence is cruel and unusual punishment per se, and must be set aside.

However should this Court reach the conclusion that the aggregate of fifty five (55) years is not cruel and unusual within the meaning of the Eighth Amendment, then petitioner urges this Court to review the excessive nature of his sentence, in the exercise of its supervisory power over the administration of justice in the lower federal courts, and to review the duration of that sentence imposed by the District Court, even though the duration of the sentence does not exceed the statutory maximum. Carbo v. United States, 364 U.S. 611

(1961); United States v. Holder, 412 F. 2d 212 (CA2d, 1969); United States v. Moore, 427 F. 2d 38 (CA5th, 1970), cert. denied, 400 U.S. 965.

In deliberating upon its sentence the District Court erroneously concluded that petitioner fled Virginia while being prosecuted, travelled to New Jersey, and then extended his illegal business to California. That conclusion is not supported by any view of the facts, the record in the case, or the Pre Sentence Report. The District Court further stated with regard to petitioner's barbituate activity:

> ".... for this Court to merely, because of the fact that we are dealing with a ten year minimum here, to impose the minimum because of its private deterrent effect seems to me would be to ignore the message of Congress with regard to the significance of criminal conduct of this kind."

Petitioner submits that the Court

erred in believing that Congress mandated any sentence greater than the minimum for activity of this kind, and despite the instant Court recognizing the private deterrent effect a ten (10) year sentence would have in cases involving the distribution of quaaludes. The record in this case, and before Congress, is barren of supporting evidence for the District Court's statement. Furthermore, there is no evidence before Congress or in the record to support the additional statement of the District Court that the instant crime:

> .... is a serious one, not that within the very maximum of the range involved here, but far from the minimum as well.

Congress has set no such guidelines, and if this statement is merely the

philosophy of the sentencing Court, than the Court wrongly sentenced the crime primarily, and the petitioner secondarily. The District Court clearly abused its discretionary sentencing power, and acted upon a mistaken view of the facts and the law.

Abuse of discretion is a sufficient predicate on which to base direct appellate review of sentences imposed by the District Court within statutory guidlelines. United States v. Brown, 382 F. 2d 52 (CA 3rd, 1967); United States v. Fessler, 453 F. 2d 953 (CA 3rd, 1972).

In United States v. Daniels, 446 F. 2d 967 (1971), the Court of Appeals for the Sixth Circuit recognized that the process of sentencing was not wholly immunized from judicial review solely because the sentence fell within

permissible statutory limits. The Court stated that the exercise of the sentencing court's discretion would be subject to appellate review under limited circumstances, such as improper consideration of certain factors, improper reliance upon certain false information, or gross abuse of discretion by failing to evaluate relevant information before sentencing. See also, 33 University of Pittsburgh Law Review, 917, 927; United States v. Charles, 460 F. 2d 1093, (CA 6th,1972), [holding that there was nothing in the record to support the District Court's attempt to justify his "severe" sentence by finding defendant's beliefs to be insincere]; Woosley v. United States, 478 F. 2d 139 (CA 8th, 1973), [mechanical and automatic sentencing formulas are

inappropriate]; also similarly, United States v. Wiley, 278 F. 2d 500 (CA 7th, 1960); Leach v. United States, 334 F. 2d 945 (CADC, 1964).

Petitioner's sentence was an abuse of discretion by the District Court, and unsupported in its conclusions, and should be reviewed as an error of constitutional proportion. The failure of the United States Court of Appeals for the Third Circuit to reverse that sentence must be addressed by the United Supreme Court by granting the Writ.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

B. Alan Seidler
Attorney for Petitioner
118 Main Street
Tappan, New York 10983
(914) 359-3770

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NO. 84-5546

UNITED STATES OF AMERICA

v.

JOSEPH VINCENT THOMAS, a/k/a "Vinny Thomas,"
a/k/a "Vincent Marlin," a/k/a "Joseph Quest"

On Appeal from the United States District Court for the District of New Jersey Trenton (D.C. No. 83-00361-01)

District Judge: Honorable John W. Bissell

Submitted Under Third Circuit Rule 12(6)

February 7, 1985

Opinion Filed February 12, 1985

Before: GARTH, BECKER, AND ROSENN, Circuit Judges

MEMORANDUM OPINION OF THE COURT

ROSENN, Circuit Judge.

The Government charged the defendant, Joseph Vincent Thomas, in a six count indictment with violating 21 U.S.C. §848 (knowingly and intentionally engaging in a continuing criminal enterprise) in concert with at least six other persons, conspiracy to distribute and possess with intent to distribute controlled substances, the substantive counts charging violations of 21 U.S.C. §841(a)(1). Following an unsuccessful effort between

the defendant and the Government to enter into a cooperative plea agreement, the defendant retracted his original plea of not guilty and entered a plea of guilty pursuant to a non cooperative plea agreement with the Government to count I charging the violation of 21 U.S.C. §848.

At sentencing, defense counsel addressed all factual matters in the presentence report, correcting or giving the defendant's version of all controverted facts in the report. The district court explained that he firmly believed that the defendant should be sentenced for the crime to which he pled guilty "and not [for] some other unproven incidents." After an eloquent plea from defense counsel to have sentence imposed concurrent with a 40 year sentence presently

being served by the defendant under a state sentence in Virginia,[1] a plea for leniency from the defendant personally and from his mother, the court felt constrained to impose a 15 year sentence of imprisonment to run consecutive to the sentence imposed under the law of Virginia. In accordance with the plea agreement, the Government dismissed the remaining counts of the indictment.

---

[1] Under the terms of the plea agreement, the Government took no position with the court as to whether the sentence should be concurrent or consecutive.

The defendant appeals contending that the sentence imposed was cruel and unusual and violated the Eighth Amendment of the United States Constitution and, alternately, constituted an abuse of discretion by the district court. In addition, defendant contends that the district court imposed its sentence on the basis of false and incomplete information. After carefully reviewing the briefs and record, we affirm.

The sentencing decision is a function traditionally vested in the trial court and, "if within statutory limits, is generally not subject to review." United States v. Tucker, 404 U.S. 443, 447 (1972). In sentencing this defendant, the district court carefully considered the personal

circumstances of the defendant and his family, the seriousness of the crime, and imposed a term of 15 years under a statute prescribing a minimum sentence of 10 years and a maximum sentence of life imprisonment. The defendant's argument that the sentence is cruel and unusual punishment per se" because it is consecutive to a 40 year sentence imposed by the State of Virginia is unsupported by authority. Fuerthermore, it misconstrues the terms of the eighth amendment. As the Supreme Court noted in Rummel v. Estelle, 445 U.S. 263, 275 (1980), the amendment is directed to punishment that is cruel and unusual in kind, not in degree. The limitations on sentencing are imposed by Congress and the district court very nearly confined itself to the bottom of the

range explicitly provided for this offense.

As for defendant's alternative argument that the district court abused its discretion, we see no merit in it. The district court painstakingly explained to the defendant and counsel that it was imposing sentence on the basis of the defendant's own criminal acts and in accordance with the statutory terms mandated by Congress. The record demonstrates a carefully reasoned exercise of judicial discretion by a very concerned and sensitive judge.

The defendant's contention that the court imposed sentence on the basis of false and incomplete information is frivolous and without foundation. The Government completely complied with its plea agreement with

the defendant at sentencing.

The judgment of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NO. 84-5546

UNITED STATES OF AMERICA

v.

JOSEPH VINCENT THOMAS, a/k/a "Vinny Thomas,"
a/k/a "Vincent Marlin," a/k/a "Joseph Quest"

On Appeal from the United States District Court for the District of New Jersey Trenton (D.C. No. 83-00361-01)

District Judge: Honorable John W. Bissell

Submitted Under Third Circuit Rule

12(6)

February 7, 1985

Opinion Filed February 12, 1985

Before: GARTH, BECKER, AND ROSENN, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Disrtict of New Jersey and was submitted under the Third Circuit Rule 12(6) on February 7, 1985.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the district court entered on July 16, 1984, be and the same is hereby affirmed.

Attest:

Sally Mrvos /s/

Clerk

Certified as a true copy and issued in lieu of formal mandate on March 6, 1985.

Test: M. Elizabeth Ferguson /s/

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

Dated: February 12, 1985

UNITED STATES DISTRICT COURT

for the DISTRICT OF NEW JERSEY

United States of America

vs.

JOSEPH VINCENT THOMAS

Cr. 83-361-01

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant apeared in person on this date, July 16, 1984, with counsel, B. Alan Seidler, Esq.

PLEA

GUILTY, and the Court being satisfied that there is a factual basis for the plea TO COUNT I.

FINDING & JUDGMENT

Defendant has been convicted as charged of the offense of 21:848 Continuing Criminal Enterprise.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of fifteen (15) years to run consecutively with sentence imposed by the State of Virginia.

ORDERED COUNTS 2,3,4,5, and 6 be dismissed on government's application.

COMMITMENT RECOM-

MENDATION

The court orders commitment to

the custody of the Attorney General and recommends,

JOHN W. BISSELL, U.S.D.J. /s/

Date 7/18/84

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

CERTIFIED AS A TRUE COPY ON

This date 7-18-84.